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**OCT 18 2005**

**OFFICE OF PETITIONS**

In re Application of  
Michael B. Marks, et al.  
Application No. 09/838,330  
Filed: April 20, 2001  
Attorney Docket No. Box-2

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ON PETITION

This is a decision in response to the communication filed May 6, 2005, which is being treated as a renewed petition under 37 CFR 1.137(b) to revive the above-identified application.

The petition is **DISMISSED**.

A grantable petition under 37 CFR 1.137(b)<sup>1</sup> must be accompanied by: (1) the required reply,<sup>2</sup> unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(c). Where there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137 was unintentional, the Commissioner may require additional information. See MPEP 711.03(c)(III)(C) and (D). The instant petition lacks item 1.

It is noted that an amendment was included with the petition filed on May 6, 2005. However, the amendment is considered non-responsive, since it did not place the application in condition for allowance. See the attached Advisory Action. The proposed reply required for consideration of a petition to revive this application must be a Notice of Appeal (and appeal fee required by 37 CFR 1.17(b)), an amendment that *prima facie* places the application in condition for allowance, or the filing of a submission under 37 CFR 114 (RCE) or a continuing application under 37 CFR 1.53(b). See MPEP 711.03(c)(III)(A)(2).

It is further noted that, while the requisite petition fee was paid on January 27, 2005, petitioner submitted a \$750.00 petition fee with the present petition. Since, no further petition fee is required for consideration of the present petition, the \$750.00 overpaid is subject to a refund.

<sup>1</sup> As amended effective December 1, 1997. See Changes to Patent Practice and Procedure; Final Rule Notice, 62 Fed. Reg. 53131, 53194-95 (October 10, 1997), 1203 Off. Gaz. Pat. Office 63, 119-20 (October 21, 1997).

<sup>2</sup> In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

Any request for refund must include a copy of this decision and be mailed to Mail Stop 16, Director of the U.S. Patent and Trademark Office, P. O. Box 1450, Alexandria, VA 22313-1450 or faxed to the Customer Service Help Desk at (571) 273-6500.

This decision is made without prejudice to reconsideration. However, any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)" and the required reply as noted above.

Further correspondence with respect to this matter should be addressed as follows:

By mail:                      Mail Stop PETITION  
                                    Commissioner for Patents  
                                    Post Office Box 1450  
                                    Alexandria, VA 22313-1450

By hand:                     U.S. Patent and Trademark Office  
                                    Customer Service Window, Mail Stop PETITION  
                                    Randolph Building  
                                    401 Dulany Street  
                                    Alexandria, VA 22314

The centralized facsimile number is (571) 273-8300.

Any questions concerning this matter may be directed to the undersigned at (571) 272-3204.



Sherry D. Brinkley  
Petitions Examiner  
Office of Petitions  
Office of the Deputy Commissioner  
for Patent Examination Policy

Attachment: Advisory Action